No. 01-287

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

v.

DUVAL COUNTY SCHOOL BOARD and THE DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DUVAL COUNTY SCHOOL BOARD AND SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Does the Duval County School Board's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies facially violate the Establishment Clause?

2. Should the petition for writ of certiorari to the Eleventh Circuit Court of Appeals to review the reaffirmed and reinstated *en banc* decision upholding the policy be granted?

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United States Constitution:

First Amendment 1, 26

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' quotation of the First Amendment provisions implicated in this appeal is unduly restrictive. The relevant language of the First Amendment is as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

RESPONDENTS' POLICY PROVISIONS

The operative provisions of Duval County School Board's policy at issue in this case read as follows:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The Policy states the purpose of the above provisions is as follows:

> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

STATEMENT OF THE CASE AND FACTS

This case presents a facial Establishment Clause challenge to a Duval County School Board policy allowing graduating seniors to have one of their members make brief remarks on any subject of the student's choosing near the beginning or end of their graduation ceremonies, and prohibiting school officials from intervening or interfering with the speaker's remarks. Regrettably, the petition for writ of certiorari uses incomplete and misleading quotations, mischaracterizes the evidence in the record, and misstates the nature of the Duval County School Board's arguments below in an effort to have this Court review the *en banc* decision of the Eleventh Circuit Court of Appeals in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) ("*Adler V*").

In *Adler V*, the Eleventh Circuit held that the Duval County School Board's Policy ("Duval County Policy" or "Policy") of permitting a graduating high school student, elected by her class, to deliver a brief unrestricted message of her choice at the beginning and/or the closing of graduation ceremonies does not facially violate the Establishment Clause. In so holding, the Eleventh Circuit carefully examined this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) ("*Santa Fe*") and correctly applied the law provided by this Court to the facts in this cause.

The substantive guidelines in the Duval County Policy[1] under review, quoted above, are not content driven. They allow

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1. The Policy is contained in a May 5, 1993, memorandum to high school principals from Ms. Vicki Reynolds, Liaison for Legal Affairs for the Duval County School Board, which the Board adopted by acquiescence or tacit approval. *Adler v. Duval County School Board*, 851 F. Supp. 446, 449 (M.D. Fla. 1994) ("*Adler I*"). Petitioners' Appendix inadvertently indicates that the Policy was addressed to all high school

(Cont'd)

use of brief opening and/or closing remarks, not to exceed two minutes, at high school graduations within the discretion of the graduating senior class to be given by a student volunteer chosen by the graduating senior class as a whole. If the graduating senior class chooses to have a message, the content of that message is prepared by the student volunteer and cannot be monitored or otherwise reviewed by the Duval County School Board, its officers or employees. The Policy states the purpose of the guidelines is to allow students to direct their own graduation messages without monitoring or review by school officials.[2]

(Cont'd)
"Principles." *See* App., p. 267a. The Policy memorandum is captioned "Re: Graduation Prayers" which the Eleventh Circuit stated

> merely introduces the topic of debate within Duval County in the aftermath of *Lee* rather than suggesting, let alone compelling, the outcome of that debate. The title affixed to the Reynolds Memorandum does no more than alert the reader to the general subject matter of the text; and it remains the language and substance of the policy, rather than its title, that is controlling.

Adler v. Duval County School Board, 206 F.3d at 1070, 1087 (11th Cir. 2000) ("*Adler IV*").

2. This is in contrast with the "purpose" or reason noted in the introductory portion of the Policy as to why Ms. Reynolds was addressing the issue at that time in the first place. Compare Petition, p.3. Threats from advocates and opponents of student religious speech surrounded the 1993 graduation season. The Policy notes on its face: "[T]his area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take." *Adler IV*, 206 F.3d at 1072.

Board Chairman Donald Buckley voiced the clear concern that the Board remove itself from the decision making process completely during Board debate a month later on a moment of silence proposal which was rejected: "I think the only way we can keep ourselves clear on this thing

(Cont'd)

On July 22, 1992, following this Court's decision in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) ("Lee"), Vicki Reynolds, Liaison for Legal Affairs for the Duval County School Board, revised existing policy and practices by sending a memo to all Duval County school

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(Cont'd)
is to keep ourselves out of what happens in this area of the graduation ceremony." *Adler IV*, 206 F.3d at 1088 n.8. This is the same debate at which another Board member spoke as quoted in the Petition at p.4. Neither remark reflects the Board's collective intentions as to the Policy which is in issue here, which was promulgated by Ms. Reynolds earlier, and which never came before the Board for debate or for a vote. The Eleventh Circuit in *Adler V* addresses this point specifically as follows:

> We also noted that the text of the policy did not reveal a religious purpose, and that the limited pieces of background evidence highlighted for the contention that the policy's secular purpose was a sham could not "strip the policy of [its] secular purpose. No matter what an individual board member may have hoped — and they said nothing on the record about codifying this policy — Duval County's policy is facially neutral and undeniably evinces a secular purpose." *Id.* at 1089.

Adler V, 250 F.3d at 1334. See also *Adler I*, 851 F. Supp. at 451-52, App. 240a to 242a, where the trial court wrote as to the alleged intent or purpose of the Board members to similar effect:

> So, here, to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds) the purposes or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds memorandum of May 5. The discussion pointed to by the Plaintiffs had to do with an alternative proposal — the "moment of silence" — and the views that were expressed were those of three members, less than a majority. Furthermore, of those three, only one clearly expressed a preference for the retention of prayer as a board sanctioned activity. . . . [t]hat evidence is so attenuated as to have no probative value.

principals which expressly prohibited all prayers, benedictions and invocations at all graduation ceremonies. Thereafter, in 1992, the Fifth Circuit Court of Appeals decided *Jones v. Clear Creek Independent School District*, 977 F. 2d 963 (5th Cir.), *rehearing denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993). *Clear Creek* held that student initiated prayers at high school graduation ceremonies were constitutional under limited circumstances. After this holding, Dr. Larry Zenke, the Superintendent of the Duval County School System, and Ms. Reynolds received many inquiries about whether voluntary student initiated prayer at graduations was allowed. At Dr. Zenke's request, Ms. Reynolds sought an opinion from the Office of General Counsel, the Board's attorneys, on the status of the law in this sensitive area.[3]

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3. Petitioners misquote Dr. Zenke's deposition testimony at page 3 of the Petition. They also omit portions of the answer, which creates a misleading impression of the context to the Court. The full question and answer given are as follows:

> Q. What do you recall her communicating to you in terms of the gist of the memorandum [from The General Counsel's office]?
>
> A. Based upon her discussion and what was contained within the written opinion, that it would be appropriate for us to communicate to *principals* that they *could allow a student-initiated and student-led prayer within the commencement exercise, but the administration, adults, entirely should take a hands-off policy and be involved in no way*. She then at my direction developed a memorandum that went to principals in which she communicated that to our principals. (emphasis added)

Moreover, Superintendent Zenke was clear and unequivocal in testifying that it was not his intent to establish prayer or favor prayer over any other type of student message:

> Q. Was your purpose to establish prayer?

(Cont'd)

The General Counsel's Office reviewed the law, including *Lee v. Weisman*, *supra*, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) ("Lemon"), and numerous other Establishment Clause precedents, and concluded that the Constitution requires governmental neutrality toward religion and religious speech. The General Counsel's office recommended policy language to make it clear that the Board was not favoring any particular type of student speech and to completely remove governmental actors from students' private decision-making processes.

After receiving and discussing the General Counsel's Office's legal analysis with the superintendent, Ms. Reynolds sent a memorandum to all high school principals dated May 5, 1993, which adopted this recommendation and established the above substantive guidelines.

A. The 1993 Graduations

In 1993, graduations occurred at Duval County's 17 public high schools under the guidelines suggested in the Policy. At 7 of the 17 graduations (41% of the schools), there either was no religious content to any of the spoken messages of the students elected by their senior class peers, or no student message at all. *Adler IV*, 206 F.3d at 1072; *Adler V*, 250 F.3d at 1339. At the other 10 high schools, there was some form of religious speech. At one school, a Hindu student offered a prayer. 1SR-3-106-30, Zenke deposition.

(Cont'd)

A. Absolutely not.

Q. Was it your purpose to favor prayer over any other message students might give?

A. Absolutely not.

Zenke deposition, p. 25, l. 18-22.

There is almost nothing in the record regarding whether any religious speech occurred at graduations from 1994 to the present.[4] The record simply does not substantiate Petitioner's unfounded assertion at page 4 of the Petition that the student messages "since enactment of the policy, have most often constituted prayers." Other than a composite exhibit containing various graduation programs (and one rank hearsay, conclusory affidavit the trial court chose not to strike), Petitioners introduced no evidence from the numerous graduations between 1994 and 1998 regarding the actual content of any of the student speakers' remarks. It is equally wrong for Petitioners to contend that there is "no doubt" that there has been a "predominance of prayer as a result of the policy from 1994 through 1997," or that Respondents have "never argued or produced evidence to the contrary." Petition, pp. 4-5 n.2. The record is virtually devoid of evidence as to what was spoken by the student speakers at graduations during those years, as the Board has consistently argued in this case, contrary to Petitioners' assertions.

B. Procedural History

The procedural history of this case is fully set forth in the prior published opinions of the District Court and the Eleventh Circuit.[5] Following the 1993 graduations, Plaintiffs' predecessors filed suit in federal district court in Jacksonville seeking to invalidate the Policy. The lead plaintiff in the first case was Karen Adler. Plaintiffs initially sought a preliminary injunction along with facial and as applied claims on the merits. Following discovery, the trial court held the Policy constitutional and granted the School Board's motion for summary judgment.

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4. The materials are primarily programs from various schools. *Adler v. Duval County School Board*, 174 F.3d 1236, 1241 (11th Cir. 1999) ("*Adler III*"), Petitioner's Appendix, p. 148a n.4. *See also* Exhibits to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction. 1SR-1-3, Exhibits Folder. Only exhibits 52 and 58 contain any specific comments of an arguably religious nature.

5. *See Adler I*, 851 F. Supp. at 446-48; *Adler IV*, 206 F.3d at 1071-73.

Adler I. Plaintiffs appealed. The Eleventh Circuit affirmed without reaching the constitutional issues in *Adler v. Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997) ("*Adler II*"), holding that the claims for injunctive and declaratory relief were moot due to the graduations of various student plaintiffs and that the damages claims had been waived. *Adler IV*, 206 F.3d at 1073.

This case, by Emily Adler *et al.*, was filed in May 1998, heard by the same district judge who heard and decided *Adler I*, and challenged the Policy on substantially the same record. New plaintiffs were selected to try to cure the mootness issues.

Plaintiffs sought a preliminary injunction, which the trial court consolidated with the trial on the merits with Plaintiffs' knowing consent. This left little time for supplemental discovery. *See Adler IV*, 206 F.3d 1073-74 n.4. As a result, there is essentially no evidence in the record as to the content of any religious speech which may have occurred in the graduations of 1994, 1995, 1996, 1997, or 1998. The trial court again sustained the Policy, this time in an unpublished order, and Plaintiffs appealed.

A three judge panel of the Eleventh Circuit initially reversed and found the Policy to be unconstitutional on its face in a 2-1 opinion. *Adler III*, 174 F.3d at 1251. The Board and Interveners then filed motions for rehearing *en banc*, which were quickly granted. The Eleventh Circuit held in a 10-2 *en banc* decision that the Policy is constitutional on its face.[6]

Following the Eleventh Circuit's initial *en banc* holding that the Policy is constitutional on its face, Appellants sought

6. This appeal presents only a facial challenge to the Policy. *Adler V*, 250 F.3d at 1332-33, 1338, 1341-42; *Adler IV*, 206 F.3d at 1073-74. The Policy *on its face* does not call for votes to be taken on "the specific issue of whether to include prayer at graduation." Nor does it call on its face for "senior class officers" to vote on the student speakers at graduation. Compare petition, page 4.

certiorari review, which was granted after *Santa Fe* was decided. This Court vacated the *en banc* holding by order dated October 2, 2000, *Adler v. Duval County School Board*, 531 U.S. 801, 121 S. Ct. 31, 148 L. Ed. 2d 3 (2000), and remanded for reconsideration in light of the holding in *Santa Fe*. Upon reconsideration, the Eleventh Circuit has determined that the *Santa Fe* policy is "fundamentally different" from the Duval County policy "in many crucial respects," *Adler V*, 250 F.3d at 1334, and it has reaffirmed and reinstated its prior decision.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's *en banc* decision is constitutionally correct. This Court's holding in *Santa Fe* is not in conflict with it, and the *en banc* decision should be left undisturbed.

The *en banc* decision in *Adler V*, reaffirming that the Duval County policy of permitting a graduating student, elected by her class, to deliver a brief unrestricted message of her choice at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause, properly recognizes that private religious speech in high school graduation ceremonies must be accommodated in a neutral fashion by the government. This Court's holding in *Santa Fe* does not alter this analysis or conclusion. To the contrary, the Eleventh Circuit's holding is fully consistent with the holding in *Santa Fe* because there are fundamental differences between the history, practices and policy provisions in Duval County, as compared to those in the Santa Fe Independent School District, which clearly distinguish *Santa Fe* from this case.

This Court invalidated the *Santa Fe* policy because that policy was specifically designed to perpetuate a longstanding practice of sectarian Christian prayer at football games. The Santa Fe policy deliberately promoted prayers, given the evolution behind the policy and its express terms. Students specifically voted on *whether to pray* at games, a constitutionally

improper subject for a majoritarian student vote. The *Santa Fe* policy also lacked a legitimate secular purpose under the *Lemon* test. Since the same student delivered the prayers all season long, and since football games are informal events where solemnization is inappropriate, the alleged secular purposes the district advanced in support of its policy were a sham. Further, the policy as designed and implemented provided school administrators with significant censorship and content controls over the student speech to make sure that the prayers were consistent with the government's goals. In sum, the *Santa Fe* policy endorsed and encouraged an inevitable pregame prayer with the administration's blessing.

This is in stark contrast to the Duval County Policy, which the Eleventh Circuit has determined to be fundamentally different factually from the *Santa Fe* policy. The Duval County Policy neither contemplates, establishes, encourages nor prohibits religious speech. It merely permits graduating senior classes to decide whether or not to include unrestricted messages as part of their ceremonies. If so, they choose a speaker who, alone, decides what to say. Government monitoring, control, and content review are expressly prohibited. Any student speech is therefore purely private and is not attributable to the state. There is no government endorsement, encouragement or sponsorship of coercive formal religious exercises, and thus no violation of this Court's holding in *Lee v. Weisman*, *supra*.

The Duval County Policy also complies fully with the three prong *Lemon* test: the secular purpose, primary effect, and excessive entanglement standards. The Eleventh Circuit determined that the Duval County Policy has a legitimate secular purpose, including allowing students to direct a portion of their own graduation ceremony and permitting student freedom of expression. Since it is a graduation speech policy, not a football game prayer policy, solemnization also is an appropriate secular purpose which it advances. The Policy also satisfies the primary effect prong of the *Lemon* test because it allows either religious

or secular speech equally on its face. It is purely content-neutral and does not even require that any graduation message occur at all, let alone dictate its content. During the 1993 graduations which occurred under this Policy, the students chose to have purely secular content, or no messages at all, 41% of the time. There was some form of religious speech at the other ceremonies. This roughly equally divided result is consistent with, and evidence of, the facial content and viewpoint neutrality of the Policy. Finally, the Policy does not violate the excessive entanglement prong, because government review, monitoring and control of content is prohibited. This keeps government out of censoring or predetermining student's private choices.

Most importantly, *there is no unconstitutional majoritarian vote to pray* which infringes on minority rights under the Duval County Policy. The majoritarian vote this Court found to be unconstitutional in *Santa Fe* was a specific vote by the students on whether or not to have prayers at football games. The parties in *Santa Fe* stipulated to this point. *Santa Fe*, 530 U.S. at 317 n.24. Minority views were completely frozen out. In contrast, the Duval County Policy is purely content-neutral. Students vote only on whether or not there may be *speech*, free speech, in the form of a brief message, unrestricted in theme or content, near the beginning or end of the graduations. If so, a single student, wholly free of government involvement or direction, then decides what to say, not the school board, not the principal, and not any senior class majority. The subject can be anything. It may be religious, or not. It may be a greeting or a farewell. There may be no remarks at all.

Both factually and constitutionally, the Duval County Policy and the *Santa Fe* Policy are fundamentally different. The Petition for Writ of Certiorari therefore should be denied, as the *en banc* holding of the Eleventh Circuit is correct on the merits of this case.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *SANTA FE* DOES NOT CONFLICT WITH THE *EN BANC* DECISION IN *ADLER V*, AND THE EN BANC DECISION SHOULD BE LEFT UNDISTURBED.

The Eleventh Circuit, *en banc*, framed the issue on appeal as follows in *Adler IV*:

> The central issue presented is whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause.

206 F.3d at 1073. The Court concluded:

> Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause merely because an autonomous student speaker *may* choose to deliver a religious message.

Id. at 1073-74 (emphasis in original).

Early in its opinion on remand in *Adler V*, the Eleventh Circuit states by way of overview how it proceeded, what it decided, and why:

> Having carefully reviewed the Supreme Court's opinion, and considered supplemental briefs from the parties and amici, we conclude that *Santa Fe*

> does not alter our previous en banc decision, and accordingly we reinstate that decision and the judgment in favor of Duval County. Nevertheless, we take this opportunity to explain why we believe that *Santa Fe* does not alter the outcome of this case. Simply put, after (as before) *Santa Fe*, it is impossible to say that the Duval County Policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how private the message or how divorced the context of the message may be from any state review, let alone censorship. *Santa Fe* does not go that far, and we are not prepared to take such a step.

Adler V at 1332. (emphasis added).[7] The holding in *Santa Fe* neither changes the appropriate questions to be considered, nor dictates a different decision than in *Adler IV* and *V*.

A. The *en banc* holding is consistent with this Court's holding in *Santa Fe*.

The Petition devotes only one sentence at the bottom of page 6 to summarize the reasoning of the Eleventh Circuit that it asks this Court to overturn. Unlike the Petitioners, the Eleventh Circuit went into considerable depth in its analysis of why *Santa Fe* does not affect the outcome in this case. A brief discussion of the essential points in the Court's reasoning, and why the holding is correct, follows.

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7. The Eleventh Circuit repeatedly emphasized that this appeal presents only a facial challenge to the Policy. *See* footnote 6 above. Issues on whether implementation of the Policy deviated on occasion in practice from the stated guidelines is not before the Court. Petitioners' as applied challenges were waived below. *See Adler IV*, 206 F.3d at 1073 n.4.

1. The *Santa Fe* Policy, unlike the Duval County School Board Policy, expressly promoted prayer.

In *Santa Fe*, the Santa Fe Independent School District had a long history of acts plainly favoring and endorsing proselytizing sectarian Christian pursuits. The district promoted attendance at Baptist revival meetings, encouraged membership in religious clubs, chastised children of minority beliefs, distributed Gideon Bibles on school premises, allowed students to read Christian invocations and benedictions from the stage at graduations, and delivered overtly Christian prayers over the public address system at football games. 530 U.S. at 294-95.

Over a period of two years, the *Santa Fe* school district passed a series of graduation policies and football policies which undeniably intended to preserve existing practices involving government sanctioned prayers. The final football policy (modeled after the graduation policies) was before this Court for review. The first graduation policy prohibited invocations or benedictions by clergy and formal religious exercises. The district then decided to "permit" graduating seniors, with "the advice and consent of the senior class sponsor," to elect to have "nonsectarian, nonproselytizing invocations and benedictions." After an interim district court order in May 1995 permitted "nondenominational prayer" for the 1995 graduation,[8] a third policy was passed calling for secret student ballots and keeping the "nonsectarian and nonproselytizing" requirement. In July 1995, a fourth policy deleted that requirement but would

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8. *See Doe v. Santa Fe Independent School District*, 168 F.3d 806, 810-12 (5th Cir. 1999). The text of the order leaves absolutely no doubt that the school district *and* the district court intended to approve prayers at graduation, and it is against this backdrop that the football policy had to be interpreted. The Court's Order on Plaintiffs' Motion for Temporary Restraining Order permitted "student selected, student-given, nonsectarian, nonproselytizing invocations and benedictions." It also stated

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automatically reinstate it if the policy were enjoined without it. 530 U.S. at 295-96.

In August 1995, the district enacted a "Prayer at Football Games" policy which was similar to the July graduation policy, including a similar fallback provision. In October 1995, the district adopted another football game policy omitting the word "prayer" from the title, and referring to "messages" and "statements," but, significantly, retaining mention of "invocations." *Id.*

On August 31, 1995, under the first football policy, "the district's high school students voted whether a student will deliver prayer at varsity football games." A week later, they elected a student "to deliver the prayer at varsity football games." 530 U.S. at 297. No new vote occurred under the last football game policy. 530 U.S. at 309.

2. The Duval County Policy (in *Adler V*) and the *Santa Fe* Policy are Fundamentally Different.

Both factually and constitutionally, the Duval County Policy and the Santa Fe Policy are fundamentally different. These differences include the following:

(Cont'd)

> general prayers to the "Almighty", or to "God", or "Our Heavenly Father (or Mother)" or the like, *will of course be permitted*. Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, *will likewise be permitted*, as long as the general thrust of the prayer is nonproselytizing as required by [Clear Creek II].

168 F.3d at 811 (emphasis added). The Fifth Circuit reversed as to the "nonsectarian" prayers portion of the order. *Doe*, 168 F.3d at 822.

a. Unlike the Duval County policy, the *Santa Fe* Policy would inevitably result in prayer and the exclusion of minority views.

Under the *Santa Fe* policy, this Court found that an affirmative vote meant prayers would always result and minority views would never be expressed:

> . . . the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

530 U.S. at 304. The result would be "an inevitable pre-game prayer." 530 U.S. at 308.

In contrast, the Duval County Policy does not result inevitably in prayer. As the Eleventh Circuit stated in *Adler IV*, its first *en banc* opinion: "No religious result is preordained under the [Duval County] policy." *Adler IV*, 206 F.3d at 1084. Nor are minority viewpoints excluded. As noted above, in 1993, under the Duval County Policy, 41% of the high schools either had no message or had a message without religious content. Of the remaining messages, one was a prayer given by a minority speaker, a Hindu student. The neutral provisions of the Duval County Policy — neither requiring nor prohibiting religious expression — have yielded divided results in practice. Students have gone both ways, approximately equally, in exercising their choices.

b. Unlike the Duval County Policy, the subject of the *Santa Fe* vote was improper.

The *Santa Fe* policy involved a specific vote on whether to have prayer at varsity football games. 530 U.S. at 316. The policy was facially invalid "because it impermissibly imposes on the student body a majoritarian election on the issue of prayer." *Id.*

On remand, the Eleventh Circuit quite specifically and correctly noted the importance to this Court of the fact that the vote in *Santa Fe* was on *whether or not to pray*. *Adler V*, 250 F.3d at 1334-35, 1337-39.

By contrast, the Duval County Policy does not involve a majority vote on prayer, or even on religion in general. It is viewpoint neutral.[9] The Eleventh Circuit recognized this and stated that:

> . . . *unlike a direct student plebiscite on graduation prayer, not even the senior class exercises control over the content of the graduation message*. That decision rests solely with the elected student speaker — with neither the senior class nor the school exercising any sort of editorial oversight . . .

Adler IV, 206 F.3d at 1076. (emphasis added)

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9. Petitioners' reliance on this Court's holding in *Board of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), is misplaced. In *Southworth*, this Court found a referendum feature of student activity fee funding mechanisms to be of concern "to the extent the referendum substitutes majority determinations for viewpoint neutrality" and does "nothing to protect minority views," but rather holds such views "at the mercy of the majority." *See* 529 U.S. at 235; *Santa Fe*, 530 U.S. at 304. *Southworth* does not stand for the broad principle Petitioners suggest at p. 11 n.5 of the Petition, that "[E]ven in a limited public forum, participation determined by majority vote is unconstitutional." *Southworth* supports the School Board's Policy and the *en banc* decision. The Court held that the government was not the speaker, even though it enacted the fee to create the forum for the student speech. 529 U.S. at 235. Similarly, under the Duval County Policy, the District is not the speaker in this case simply because it provided the forum where the student speech occurred.

c. Unlike the Duval County Policy, the alleged secular purposes under the *Santa Fe* Policy were a sham.

This Court found the alleged secular purposes behind the *Santa Fe* policy were a sham. It found the district's several successive policies were intended to "preserve the practice of prayer before football games." 530 U.S. at 308-09. After the first class vote to have an invocation or prayer under the first version of the football policy, no new vote was taken after the policy was ostensibly but transparently broadened to add "statements" and "messages" alongside of "invocations," and the explicit reference to prayers was removed. The Court considered this to be strong evidence of a sham purpose to perpetuate an existing policy and practice of prayer:

> This history indicates that the District intended to preserve the practice of prayer before football games. *The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy*. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee*, 505 U.S., at 596.

530 U.S. at 309 (emphasis added).

Football games contrast sharply with the "singular context and singularly serious nature of a graduation ceremony," "a significant, once-in-a-lifetime event," 530 U.S. at 300, where solemnity is highly appropriate. *Cf. Lynch v. Donnelly*, 465 U.S.

668, 693, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring). Moreover, the *Santa Fe* policy did not advance student free speech rights because the same student delivered the pre-game prayers all season long and because the government limited the content and diversity of the remarks. 530 U.S. at 303-04. By contrast, the Eleventh Circuit concluded that the Duval County Policy had a secular purpose, including "affording graduating students an opportunity to direct their own graduation ceremony" and "permitting student freedom of expression." *Adler V*, 250 F.3d at 1334. *See also Adler IV*, 206 F.3d at 1085-86, where the Court identified three separate secular purposes the Duval County Policy advances.

d. Unlike the Duval County Policy, there was extensive governmental involvement under the *Santa Fe* policy which caused the resulting student speech not to be private speech, but rather attributable to the government.

The *Santa Fe* policy had direct school administrative involvement in the student election process *and* in the form of content restrictions of the student expression to insure consistency with purposes of the school administration (*i.e.*, "entanglement" under *Lemon*). Santa Fe's seniors could elect to have a "statement or invocation" upon the "advice and direction of the high school principal." 530 U.S. at 298 n.6. There were "particular regulations that confine the content and topic . . ." 530 U.S. at 303. Government control not only was possible, but required. By contrast, the Duval County School Board Policy contains no content and topic requirements, and it prohibits all government monitoring, advice and direction. There is no censorship or governmental control. The speech, if there is any, is truly private. In *Adler IV*, the Eleventh Circuit stated:

> . . . under the Duval County graduation policy, however, neither the School Board nor its principals

> may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy *explicitly divorces* school officials from the decision-making process as to whether *any* message — be it religious or not — may be delivered at graduation at all.

Adler IV, 206 F.3d at 1076. In *Adler V*, the Eleventh Circuit reiterated the crucial distinctions:

> Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the Santa Fe policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message," *Santa Fe*, 120 S. Ct. at 2276; and (2) the policy, "*by its terms,* invites and encourages religious messages," *id.* at 2277 (emphasis added). Those two dispositive facts are not present here, and that makes all the difference.
>
> First, the Duval County policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered. Indeed, school officials are affirmatively *forbidden* from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views:
>
> > If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and

> *shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees.* [ ]The purpose of these guidelines is to allow students to direct their own graduation message *without monitoring or review by school officials.* 206 F.3d at 1072 (quoting policy) (emphasis added).

This is in sharp contrast to the Santa Fe policy, under which any message was subject to content regulation by the state. The Santa Fe policy dictated that the process of selecting a speaker and delivering the message was subject to the " 'advice and direction of the high school principal.' " 120 S.Ct. at 2273 n. 6. As part of that process, school officials were effectively authorized to review the message itself to ensure that it was " 'consistent with the goals and purpose of th[e] policy.' " *Id.* The policy therefore created virtually no check on school officials' power to regulate the proposed student message, giving almost unfettered discretion to state officials acting under the guise of determining that the message would be " 'appropriate'." *Id.*

* * * *

Second, unlike Santa Fe's policy, the Duval County policy does not "by its terms, invite[ ] and encourage[ ] religious messages." 120 S.Ct. at 2277. On the contrary, the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message.

* * * *

The fact that the text of the Santa Fe policy expressed a clear preference for religious messages was a key

> factor in the Court's determination that student speech delivered pursuant to that policy would be viewed as state-sponsored. *Id.* at 2278-79; *compare also id.* at 2281 ("[N]othing in the Constitution . . . prohibits any public school student from praying. . . . But the religious liberty protected by the Constitution is abridged when the State *affirmatively sponsors* the particular religious practice of prayer.") (emphasis added). In this case, the text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme.

Adler V, 250 F.3d at 1336-38 (emphasis and parenthetical in original).

e. Unlike the Duval County Policy, the *Santa Fe* Policy endorsed and encouraged prayer.

The wording of the *Santa Fe* policy "invites and encourages" prayer by expressly endorsing the term "invocation" in the text. 530 U.S. at 306-07. ("Indeed, the only type of message that is expressly endorsed in the text is an "invocation" . . . ."). The district's objective toward this end was crystal clear. The last line of the *Santa Fe* policy states that any speech "must be nonsectarian and nonproselytizing," clearly religious terms. There was "only one, clearly preferred message": Santa Fe's "traditional religious 'invocation.' " 530 U.S. at 315.

By contrast, Duval County's content-neutral Policy contains no reference to or encouragement of prayer, invocations, benedictions, proselytizing, or any other religious message. The Eleventh Circuit stated:

> The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down

> vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message. *Santa Fe* does not remotely state or suggest that the term "message" connotes prayer, nor could it plausibly give so narrow a meaning to so broad a term. Instead, the Court repeatedly focused on the Santa Fe policy's use of the *additional* term "invocation," and drew from that term and the school district's concessions the conclusion that Santa Fe's policy mandated a vote on prayer. *See id.* at 2277. Similarly, there is no suggestion in *Santa Fe* that the terms "opening" and "closing" as used in Duval County's policy connote prayer. Indeed, those terms did not even appear in Santa Fe's policy. Simply put, "[w]hatever majoritarian pressures are attendant to a student-led prayer *pursuant to a direct student plebiscite on prayer* are not facially presented by the Duval County policy." 206 F.3d at 1083 (emphasis added).
>
> Although it is possible that under Duval County's policy the student body may select a speaker who then chooses *on his or her own* to deliver a religious message, that result is not preordained, and more to the point would not reflect a "majority" vote to impose religion on unwilling listeners.

Adler V, 250 F.3d at 1338-39 (emphasis and parenthetical in original).

While the Santa Fe Independent School District wanted prayers, the Duval County School Board took a neutral position and left the matter up to the individual private student speakers.

II. THERE IS NO CONFLICT BETWEEN *ADLER V* AND DECISIONS IN OTHER JUDICIAL CIRCUITS REQUIRING THIS COURT TO INTERVENE TO ASSURE CONSISTENCY OF OPINIONS.

The Petition asserts that this Court should grant review due to a conflict among the approaches in the Eleventh Circuit, the Third Circuit and the Ninth Circuit. Petition, pp. 12-14. There is no such conflict. It also asserts that the approach in the Fifth Circuit is contrary to the Eleventh Circuit's holding, and has not been reviewed by the Court because the Fifth Circuit's decision in *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999) was not reviewed to the extent that that decision discussed the Santa Fe Independent School District's graduation policies. That assertion totally lacks merit.

At present, there is no decision in the Ninth Circuit in conflict with the Eleventh Circuit's *en banc* holding. The two cases cited in the Petition, *Harris v. Joint School District #241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), and *Doe v. Madison County School District #321*, 147 F.3d 832 (9th Cir. 1998), *vacated and dismissed*, 177 F.3d 789 (9th Cir. 1999), have been vacated. They are of no precedential effect. There is another Ninth Circuit case, which petitioners do not cite, but which respondents-interveners cite in their brief in opposition, *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1228, 149 L. Ed 2d 138 (2001), which deserves brief mention. In *Cole*, the Ninth Circuit affirmed a decision in which a school principal refused to allow a sectarian proselytizing valedictory speech and a sectarian invocation. The principal was advised in advance of the content of intended remarks, and retained content control. Had the school district not so acted, it could have violated the Establishment Clause by failing to stop the presentations.[10]

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10. A recent district court decision in the Ninth Circuit is to similar effect. *Lassonde v. Pleasanton Unified School District*, __ F. Supp. 2d __, 2001 WL 1181026 (N.D. Cal. October 2, 2001).

That is virtually the exact opposite of the posture of the facts and policy in this case, where students are afforded an opportunity to make brief uncensored remarks with no advance censorship or review by school administrators. *Cole* provides no conflict with the Eleventh Circuit's decision, and no basis for granting review here.

Similarly, the Third Circuit's decision in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*), is not in conflict with the Eleventh Circuit's decision in this case. In *Black Horse Pike*, senior class officers were allowed to poll the graduating class to determine whether the seniors wanted "prayer, a moment of reflection, or nothing at all" to be included as part of the graduation ceremony. 84 F.3d at 1475. Thus, there was a specific vote on prayer. On its face, the policy was suggestive of a religious result. The Duval County Policy lacks such shortcomings. As the Eleventh Circuit noted in *Adler IV*:

> In contrast to each of these policies [in other federal circuits], Duval County students vote on whether to have a message of unspecified content delivered by a student. This is a meaningful distinction.

206 F.3d at 1079 n.7.

As to the portion of the Fifth Circuit's *Santa Fe* decision addressing the graduation prayers, *see* Petition, p. 12, this Court undoubtedly had good reasons for not granting certiorari on those provisions, while granting certiorari only on the football game policy issues. The graduation policy provisions in *Santa Fe* are clearly distinguishable from the Duval County Policy provisions, as the *Santa Fe* graduation provisions are replete with religious phraseology, as noted above. *See also Santa Fe*, 530 U.S. at 295-96. There is no conflict needing resolution as to the Fifth Circuit's holding in this regard.

Nothing in the Eleventh Circuit's reinstated *en banc* decision is in conflict with the holdings in the other federal appellate circuits discussed above. Accordingly, conflict among the circuits provides no basis to grant review of the decision in this case.

CONCLUSION

The Duval County School Board's Policy achieves the neutrality the Constitution requires. It neither requires nor prohibits religious speech at high school graduations, but does allow it if a graduating senior, a private speaker with full First Amendment rights under the Constitution, *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), so chooses.

In contrast, the sectarian prayers delivered under the *Santa Fe* policy were intended and expected by the school district and could not properly be considered private speech. The *Santa Fe* policy was constitutionally defective because: (1) prayers would always result; (2) minority views would always be excluded; (3) prayers were the specific subject of the student vote; (4) the alleged secular purposes behind the policy were a sham; (5) there was excessive governmental entanglement; and (6) there was a clear endorsement and encouragement of religion by the school district.

None of these constitutional defects is present as to the Duval County Policy. Under the Duval County Policy: (1) either no speech, *or* secular *or* religious speech, can and does result in actual practice; (2) minority students' views, such as in the selection of a Hindu speaker at one of the 1993 graduations, may be expressed; (3) the subject of the majority senior class vote in Duval County is whether an unrestricted message, *not prayer specifically*, should occur; (4) a legitimate secular purpose is served; (5) there is no governmental involvement in the speech decisions of the students because government monitoring and

review are expressly prohibited; and (6) the Policy embodies pure governmental neutrality, not endorsement and encouragement of prayer.

Unlike the impressionable middle school students in *Lee v. Weisman*, graduating seniors are mature enough to know and appreciate that when one of their own chooses freely how to express herself or himself under the Policy at issue in *this* case, it is not the act of the government establishing, endorsing or encouraging religion in a coercive fashion. *Compare Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)

> . . . [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis*. (Emphasis added, citations omitted).

It is a classmate acting as an individual without government sponsorship or interference, even if it occurs in public at an organized, solemn school event, and even if it is religious in nature. *See Lee v. Weisman*, 505 U.S. at 630 n.8

> If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

(Justice Souter, joined by Justices Stevens and O'Connor, concurring).

If petitioners' arguments as to the Policy in this case were correct, this Court could have declared long ago, as a clear, *per se* principle of constitutional law, that there may never be public religious expression on stage at high school graduations because someone in attendance might be opposed. It has not done so yet, and it should not and need not do so now.

The petition for writ of certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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